United States Department of Labor
Employees' Compensation Appeals Board

S.R., Appellant	)	
	)	**Docket No. 10-2159**
and	)	**Issued: July 20, 2011**
U.S. POSTAL SERVICE, HATO REY STATION, San Juan, PR, Employer	)	

Appearances:
Richard Schell-Asad, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 24, 2010 appellant, through his attorney, filed a timely appeal from a July 20, 2010 merit decision of the Office of Workers' Compensation Programs denying his emotional condition claim. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant sustained an emotional condition in the performance of duty; and (2) whether the Office properly denied his request for subpoenas.

FACTUAL HISTORY

On July 23, 2009 appellant, then a 44-year-old customer service supervisor, filed an occupational disease claim alleging that he sustained severe anxiety due to factors of his federal employment. He stopped work on July 8, 2009.

[1] 5 U.S.C. § 8101 *et seq.*

In an attached statement, appellant related that, after he requested reasonable accommodation due to severe anxiety on July 25, 2008, the employing establishment reassigned him to a work location farther from his home. He worked long hours as a supervisor at the Carolina and the employing establishment. Appellant maintained that when he complained about conducting more route inspections than any other supervisor, he was reassigned. He received two disciplinary actions in 2008. On July 14, 2008 appellant was "assigned to cover a dea[th] of a customer in the parking lot." He directed traffic, handled the media and dealt with emergency personnel until the police arrived. Appellant took emergency leave from July 17 to 28, 2008. Upon his return, the employing establishment reassigned him to perform walking routes in another location. When appellant complained, he was transferred to a more distance work location at the Ponce location to perform route inspections. He related that with commuting he worked from 6:30 a.m. to 9:30 or 10:00 p.m. Appellant had to take time off due to an accident and when he returned he had a predisciplinary interview. He related that he could not deliver the express mail due to staffing shortages.

On July 30, 2009 the employing establishment controverted the claim. Grace Rodriguez, a postmaster, noted that subsequent to a family situation a year and half earlier appellant was moved to a location closer to his residence. At the new location he alleged irregularities by management, which were investigated and found unsubstantiated. Appellant was reassigned per an agreement. He volunteered to cover a week in the Carolina Station. Ms. Rodriguez related that a customer died on the premises where appellant was working. Appellant was not involved in the incident except for ensuring cars did not enter the parking lot for a few minutes. He was emotional after the incident and missed work. Ms. Rodriguez related that appellant worked from 9:00 a.m. to 5:00 p.m. at the Ponce Station and that he received mileage. Appellant had a predisciplinary interview because he inaccurately reported that all express mail was delivered. Ms. Rodriguez denied harassment or retaliation by the employing establishment.

On June 18, 2008 the employing establishment issued appellant a letter of warning for failing to timely report an accident. In a settlement agreement, the employing establishment agreed to reduce the June 18, 2008 letter of warning to a discussion. On June 20, 2008 the employing establishment issued a letter of warning in lieu of suspension to appellant for failing to report undeliverable mail. On August 7, 2008 the letter of warning in lieu of suspension was reduced to a letter of warning to stay in his file for six months.

In a statement dated September 30, 2009, appellant related that on August 22, 2007 his older son was killed and another son seriously injured. He requested reassignment to be near his injured son. At his new workstation, appellant experienced harassment and discrimination after he reported irregularities to the Office of the Inspector General (OIG). He was transferred to a location 90 miles from his home and then to a location 120 miles round trip from his residence. Appellant requested reasonable accommodation but the employing establishment did not respond to his request. He related that on June 14, 2008 his supervisor instructed him to control access to a parking lot after one customer killed another customer. Appellant stated:

> "I was in the parking lot more than forty five minutes and I had to see how the coroner, state police, journalist (media) and safety people where dealing with the corp. in the pavement. To get access to the gate I had to pass near by the death

body and then the gate is approximately fifty feet's from the death body and when relieved by postal police, I had to be exposed to the death body again…."

Appellant took emergency leave following the incident. On July 25, 2008 he again asked for reasonable accommodation in a nonstressful environment on the day shift with no overtime. Appellant was transferred to a location 90 miles from his home. Management assigned him route inspections that "could not be completed within the requested time" and his supervisor called him derogatory names. Appellant was assigned to the employing establishment working irregular shifts which adversely affected his health. He explained the circumstances under which he failed to deliver express mail in June 2009. Appellant asserted that he was the only supervisor in the station working with an acting supervisor that lacked the knowledge to adequately share the workload.

Appellant submitted character references in support of his claim. He further submitted numerous vacancy announcements and letters rejecting his applications for positions.

By decision dated January 8, 2010, the Office denied appellant's claim that he sustained an emotional condition in the performance of duty. It found that he had not established any compensable employment factors.

On January 15, 2010 appellant requested an oral hearing. On February 23, 2010 he requested a subpoena to compel attendance and testimony of multiple individuals from the employing establishment. Appellant summarized the anticipated testimony of the individuals for whom he requested a subpoena. He asserted that testimony of various individuals would show his exposure to the dead body at the Carolina Station and that supervisors at the employing establishment worked overtime and with inexperienced coworkers. Appellant also requested a subpoena for documents related to express mail delivery, the findings of the OIG's office regarding his complaint of violations and time and attendance data from November 2008 until July 2009 for the employing establishment employees to show his irregular work hours and the amount of hours worked.

On March 17, 2010 the Office hearing representative denied his request for subpoenas. She found that appellant did not explain how the information was unavailable through other means and noted that the individuals could attend voluntarily or submit testimony. The hearing representative explained that the denial of the subpoena request was not appealable until after a decision was rendered following the hearing.

On April 7, 2010 appellant authorized representation by an attorney. The attorney, in letters dated April 7 and May 5, 2010, requested information about the hearing and a reconsideration of the Office hearing representative's denial of the subpoena requests.[2]

At the scheduled hearing held on May 5, 2010, appellant's attorney requested a continuance of the hearing because the Office did not respond to his letter requesting reconsideration of the denial of the subpoena. Counsel argued that on July 14, 2008 appellant's supervisor ordered him to watch a dead body that had been run over and pinned to a wall by a

[2] Counsel also submitted a September 23, 2009 psychiatric report.

vehicle at a crime scene. Appellant witnessed a car backing up into an individual on a bicycle, killing him. He had to secure the scene until authorities arrived, even though he had a preexisting psychiatric condition which arose after his son was violently killed. Appellant was transferred to the employing establishment and worked 16 hours per day. The employing establishment did not act on his request for reasonable accommodation. Appellant filed Equal Employment Opportunity Complaints but subsequently withdrew the complaints.

On June 4, 2010 Ms. Rodriguez related that appellant was placed in a supervisory position but had to compete for promotions. The employing establishment granted his request for reassignments to various locations and for less stressful work activities such as reviewing routes. On July 29, 2008 appellant requested a light-duty assignment rather than reasonable accommodation. Ms. Rodriguez related:

> "While he was still working in Carolina, there was a vehicle accident in the [employing establishment] parking lot which resulted in a fatality. Regrettable, [appellant] was an indirect witness to the accident and he was the one who informed Officer-in-Charge Cesar Fuentes of the accident. However, at no time was [appellant] ordered to guard, protect, watch over, or otherwise have anything to do with the accident scene. This is one of the busiest [employing establishment] facilities in all of Puerto Rico, located just blocks from emergency services. There were skilled professionals on site almost immediately."

Ms. Rodriguez related that Ms. Fuentes instructed appellant to stay inside the building at the time of the fatal accident. She asserted that after he agreed to be reassigned to Ponce, he was paid mileage and worked 9:30 a.m. to 5:00 p.m. Appellant was then promoted and assigned to the employing establishment. Ms. Rodriguez related that he was instructed to attend a predisciplinary interview when he failed to report mail that was not delivered.

On July 8, 2010 appellant's attorney challenged Ms. Rodriguez' assertion that appellant was not ordered to watch over the accident scene. He further maintained that appellant did not request transfers to new work locations.

By decision dated July 20, 2010, the Office hearing representative affirmed the January 8, 2010 decision. She found that appellant had not established compensable employment factors. The hearing representative also denied his request for subpoenas to compel the testimony of six employees of the employing establishment.

On appeal, appellant's attorney argues that the Office erred in not responding to his letter inquiring about the nature of the hearing and denying his subpoena request for the attendance of people of documents in the possession of the employing establishment regarding his request for reasonable accommodation. He asserts that appellant had previously requested the information but that the employing establishment did not comply. Counsel summarized the anticipated testimony of the individuals who had wanted subpoenaed. He maintained that the employing establishment ordered appellant to watch the crime scene on July 14, 2008. Counsel also argued that appellant requested accommodation rather than light duty, did not voluntarily accept reassignment and worked over 10 hours per day on an irregular schedule at the employing

establishment. He noted that the Office of Personnel Management found that appellant was totally disabled.

LEGAL PRECEDENT -- ISSUE 1

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act.[3] On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position.[4]

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under the Act.[5] However, the Board has held that where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.[6] In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.[7]

For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.[8] A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. Grievances and Equal Employment Opportunity complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.[9] The issue is whether the claimant has submitted sufficient evidence under the Act to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[10] The primary reason for

[3] 5 U.S.C. § 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

[4] *Gregorio E. Conde*, 52 ECAB 410 (2001).

[5] *See Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

[6] *See William H. Fortner*, 49 ECAB 324 (1998).

[7] *Ruth S. Johnson*, 46 ECAB 237 (1994).

[8] *See Michael Ewanichak*, 48 ECAB 364 (1997).

[9] *See Charles D. Edwards*, 55 ECAB 258 (2004); *Parley A. Clement*, 48 ECAB 302 (1997).

[10] *See James E. Norris*, 52 ECAB 93 (2000).

requiring factual evidence from the claimant in support of his or her allegations of stress in the workplace is to establish a basis in fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by the Office and the Board.[11]

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.[12] If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[13]

ANALYSIS -- ISSUE 1

Appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. The Office denied his emotional condition claim on the grounds that he did not establish any compensable employment factors. The Board must, therefore, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant attributed his anxiety, in part, to dealing with the death of a customer on July 14, 2008 in the parking lot of the Carolina station. He asserted that he had to direct traffic in the parking lot and deal with emergency personnel pending the arrival of the police. Appellant also had to pass by the dead body several times. Ms. Rodriguez denied that he was directed to watch over the scene of the accident and maintained that his supervisor actually told him to go inside. However, in her July 30, 2009 statement, she confirmed that appellant was asked to keep cars from entering the parking lot for a couple of minutes after the accident until postal police arrived. Ms. Rodriguez also indicated that he was an "indirect witness" to the July 14, 2008 death of a customer. Where a claimed disability results from an employee's emotional reaction to his regular or specially assigned duties or to an imposed employment requirement, the disability comes within the coverage of the Act. The facts establish that appellant witnessed the accident and was asked by his supervisor to go outside to the parking lot (whether for a few minutes as the employing establishment stated or 45 minutes as alleged by appellant) and prevent cars from entering the parking lot until emergency personnel arrived. The Board finds that appellant's presence at the scene of the accident and the role he played in the parking lot as directed by his supervisor constitute compensable employment factors.[14] As the Office found

[11] *Beverly R. Jones*, 55 ECAB 411 (2004).

[12] *Dennis J. Balogh*, 52 ECAB 232 (2001).

[13] *Id.*

[14] *Robert Bartlett*, 51 ECAB 664 (2000); *Ernest St. Pierre*, 51 ECAB 623 (2000).

that there were no compensable employment factors, it has not analyzed or developed the medical evidence. The case will be remanded to the Office to determine whether appellant sustained an emotional condition causally related to the compensable work factors.[15]

Appellant maintains that he experienced stress due to working an irregular schedule and long hours at the employing establishment, but he submitted no evidence to substantiate these allegations other than his own statements. Without corroborating evidence this factor is not factually established.[16]

Regarding appellant's assertions that the employing establishment erroneously reassigned him, failed to provide reasonable accommodation and wrongly issued disciplinary actions, the Board has held that, although the assignment of a work and matters involving transfers and disciplinary actions are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[17] An administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment.[18] In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[19] Ms. Rodriguez explained the circumstances surrounding the work assignments, transfers and disciplinary actions. While the disciplinary actions taken by the employing establishment were subsequently reduced, the mere fact that the employing establishment lessens or reduces a disciplinary action does not establish that it acted in an abusive manner towards the employee.[20] Appellant has not submitted any evidence corroborating his assertion that the employing establishment committed error or abuse with respect to these matters and thus has not established a compensable work factor.

Appellant also generally asserted that he experienced harassment and discrimination after he reported irregularities to the OIG's office. He further maintained that a supervisor referred to him in a derogatory manner. If disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from the employee's performance of his regular duties, these could constitute employment factors.[21] The evidence, however, must establish that the incidents of harassment or discrimination occurred as alleged to give rise to a compensable disability under the Act.[22] Appellant has not substantiated

[15] *See Robert Bartlett, id.*

[16] *Supra* note 10.

[17] *Karen K. Levene*, 54 ECAB 671 (2003); *Hasty P. Foreman*, 54 ECAB 427 (2003); *Katherine A. Berg*, 54 ECAB 262 (2002).

[18] *Id*.

[19] *Phillip L. Barnes*, 55 ECAB 426 (2004).

[20] *See Linda K. Mitchell*, 54 ECAB 748 (2003).

[21] *Janice I. Moore*, 53 ECAB 777 (2002).

[22] *Id*.

his allegations of harassment and discrimination with probative and reliable evidence; consequently he has not established a compensable work factor.[23]

CONCLUSION

The Board finds that the case is not in posture for decision.[24]

ORDER

IT IS HEREBY ORDERED THAT the July 20, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: July 20, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[23] *C.W.*, 58 ECAB 137 (2006); *Robert Breeden*, 57 ECAB 622 (2006).

[24] In view of the Board's disposition of the merits, the issue of whether the Office properly denied appellant's request for subpoenas is moot.